IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

WEDNESDAY, THE 14TH NOVEMBER 2007 / 23RD KARTHIKA 1929

Crl.Rev.Pet.No. 3795 of 2007()

CRA.221/2005 of ADDL.SESSIONS COURT (ADHOC)-II, KOTTAYAM
CC.691/2004 of JUDL. MAGISTRATE OF FIRST CLASS-II(MOBILE), KOTTAYAM

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REVN. PETITIONER:

M.A. NAZAR,
MALIYEKALPARAMBIL HOUSE, MARKET LAND, KOTTAYAM.

BY ADV. SRI.MOHAN JACOB GEORGE

RESPONDENTS:

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1. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR, KOTTAYAM.

2. M/S. KALLUPALAM BANKERS,
REGENT PLAZA, C.M.S.COLLEGE ROAD, KOTTAYAM.

BY PUBLIC PROSECUTOR SRI.C.M.NAZAR

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 14/11/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

V. RAMKUMAR, J.

Crl. R.P. No. 3795 OF 2007 D

Dated this the 14th day of November, 2007

O R D E R

In this revision filed under Section 397 read with Section 401 Cr.P.C. the petitioner who was the accused in C.C. No.691/2004 on the file of the J.F.C.M.-II(Mobile), Kottayam challenges the conviction entered and the sentence passed against him for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act').

2. I heard the learned counsel for the revision petitioner and the learned Public Prosecutor.

3. The learned counsel appearing for the revision petitioner re-iterated the contentions in support of the revision. The courts below have concurrently held that the cheque in question was drawn by the revision petitioner in favour of the complainant on the drawee bank, that the cheque was validly presented to the bank, that it was dishonoured for reasons which fall under Section 138 of the Act, that the complainant made a demand for payment by a notice in time in accordance with clause (b) of the proviso to Section 138 of the Act and that the revision

petitioner/accused failed to make the payment within 15 days of receipt of the statutory notice.

4. The learned counsel for the revision petitioner made the following further submissions before me:-

The person examined as PW1 is not M/s.Kallupalam Bankers but their Manager who is the Power of Attorney Holder. PW1 has deposed before court that this was not a loan given by Kallupalam Bankers but a personal loan. If so, the Power of Attorney Holder was not competent to give evidence in support of the loan transaction. But Ext.P1 cheque on the face of which shows that the payee is Kallupalam Bankers. The stand taken by the accused is a total denial of having any sort of financial relationship with the complainant. In such a case it was obligatory on the part of the complainant to produce the accounts. It was to get over from the responsibility of producing the accounts that PW1 very conveniently stated that it was a personal loan. The specific case of the accused is that he had availed a loan from one P.T.Babu and had sufficiently discharged the liability towards P.T.Babu, who instead of returning the cheque, was handing it over to the complainant and the complainant was misutilising the cheque.

5. In the face of Ext.P1 cheque where the payee is Kallupalam Bankers which is the complainant, the statement of PW1 that it was a personal loan can only be ignored. No doubt, the revision petitioner denied having any sort of financial relationship with Kallupalam Bankers. But then, his specific case was that he had borrowed amount from one P.T.Babu and on discharging the said loan the said P.T.Babu did not return the cheque. As a reasonable and prudent man the revision petitioner ought to have obtained the cheque back from P.T.Babu. At any rate, when he received the statutory notice, he was aware that P.T.Babu with whom he had entrusted the cheque had betrayed the confidence reposed in him by the revision petitioner. In spite of that the revision petitioner did not lodge any complaint before the police against the said P.T.Babu for having dishonestly parted with the cheque in favour of the first respondent/complainant. Much strain is not necessary to conclude that the said defence set up by the revision petitioner was unbelievable and false. Both the courts have considered and rejected the defence set up by the revision petitioner while entering the above finding. The said finding has been recorded on an appreciation of the oral and documentary

evidence. I do not find any error, illegality or impropriety in the finding so recorded concurrently by the courts below. The conviction was thus rightly entered against the petitioner.

4. What now survives for consideration is the question as to whether a proper sentence has been imposed on the revision petitioner. I am, however, inclined to modify the sentence in the light of the recent pronouncement by the Supreme Court that no default sentence can be imposed for an order for compensation under Section 357(3) Cr.P.C. Accordingly, the sentence imposed by the courts below on the revision petitioner is set aside and instead he is sentenced to pay a fine of Rs.40,000/- (Rupees forty thousand only) within four months from today, failing which he shall suffer simple imprisonment for three months by way of default sentence. As and when the fine amount is deposited, the same shall be paid to the 2nd respondent complainant by way of compensation under Section 357(1) Cr.P.C.

This revision is disposed of confirming the conviction but modifying the sentence as above.

(V. RAMKUMAR, JUDGE)

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